

MEMORANDUM OPINION

April 9, 2009

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION**

In re:

WEBB MTN, LLC

Case No. 07-32016
Chapter 11

Debtor

WEBB MTN, LLC

Plaintiff

v.

Adv. Proc. No. 08-3070

EXECUTIVE REALTY
PARTNERSHIP, L.P.,
GERALD FRANKLIN, TRUSTEE,
GREENBRIER DEVELOPERS, LLC,
M&A ENTERPRISES, INC., and
KENNETH WHALEY

Defendants

BEFORE THE HONORABLE RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR PLAINTIFF/DEBTOR:

MAURICE K. GUINN, ESQ.
Post Office Box 1990
Knoxville, Tennessee 37901

APPEARANCES (continued):

FOR DEFENDANTS:

THOMAS H. DICKENSON, ESQ.
Post Office Box 869
Knoxville, Tennessee 37901-0869

1 THE COURT: I thought all issues were fully explored in the Motion for
2 Partial Summary Judgment filed by Webb Mtn and the Cross Motion for Partial
3 Summary Judgment filed by the Defendants, together with the Defendants' Amended
4 Motion to Dismiss, but the Defendants filed another motion on March 3, 2009, a
5 Motion by Defendants for Judgment on the Pleadings as to Counts XII and XIII of the
6 Amended Complaint. When we got through with the other motions, Counts XI, XII,
7 and XIII of the Amended Complaint remained viable and then this Motion for
8 Judgment on the Pleadings was filed. I do not intend to rehash all the facts. The
9 parties are familiar with them and I set them out in fairly extensive detail in the
10 February 11, 2009 Memorandum dealing with the dismissal motion and respective
11 summary judgment motions. It is a pretty narrow issue that the Defendants have
12 raised in the present motion. Reading from that motion:

13 Defendants aver that both Counts XII and XIII are predicated
14 upon the Plaintiff's utilization of 11 U.S.C. § 544, combined
15 with Tennessee's fraudulent conveyance statute, to avoid certain
16 transfers that occurred on September 18, 2007, a date that was
17 three months after the date of the filing of the Debtor's petition.
18 Defendants further aver that 11 U.S.C. § 544 may only be
19 utilized by the Trustee (or here, Debtor in Possession) to avoid
20 transfers that occurred prior to the date of the petition.

21 Basically it is the transfer date that Mr. Dickenson has raised on behalf of the
22 Defendants. Rule 12(c) of the Federal Rules of Civil Procedure, made applicable to
23 adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy
24 Procedure, provides in material part:

25 After the pleadings are closed – but early enough not to delay

1 trial – a party may move for judgment on the pleadings.

2 Both of you have set forth the standards for a Rule 12(c) judgment on the pleadings in
3 your briefs and I am not going to take the time to reiterate what those standards are.

4 This bankruptcy case was filed on June 25, 2007. Count XII of the
5 Amended Complaint avers that the Conditional Extension Agreement, Escrow
6 Agreement, and the four Quit Claim Deeds placed into escrow on March 27, 2007,
7 constitute a transfer in and of themselves that is avoidable by the Debtor under
8 § 544(b) utilizing provisions of Tennessee's Uniform Fraudulent Transfer Act,
9 Tennessee Code Annotated §§ 66-3-305 and 306. The Plaintiff avers that this is a
10 stand-alone transfer that occurred on March 27, 2007, some 90 days before the
11 commencement of the bankruptcy case on June 25, 2007. I do not see any argument
12 to support the Defendants' contention that the Plaintiff avers this to have been a post-
13 petition transfer.

14 Count XIII is different. Count XIII seeks to avoid under § 544(b),
15 utilizing, again, Tennessee Code Annotated §§ 66-3-305 and 306, the transfer effected
16 by the registration in the Sevier County Register of Deeds Office of the Quit Claim
17 Deeds when they were pulled out of escrow on September 18, 2007, after I dismissed
18 the underlying bankruptcy case on September 17, 2007. Clearly, the September 18,
19 2007 registration of those four Quit Claim Deeds occurred post-petition in the sense
20 that it occurred after the Debtor filed its Chapter 11 petition on June 25, 2007. Now,
21 as you gentlemen are aware from your bankruptcy practice, when a bankruptcy case
22 is filed, as it was on June 25, 2007, all the property of the Debtor becomes property
23 of the estate pursuant to 11 U.S.C. § 541. So as of June 25, 2007, this Sevier County
24 acreage, the Webb Mountain property that is the subject of this adversary proceeding,
25 became property of the bankruptcy estate.

1 Section 544 is discussed in my 2000 decision in *Branam*, reported at
2 247 B.R. 440, which is, in turn, discussed by the Sixth Circuit Bankruptcy Appellate
3 Panel in its 2007 unpublished decision in *Troutman Enterprises, Inc.*, referred to at
4 356 B.R. 786. The unpublished version can be located at 2007 WL 205640. Both
5 *Troutman* and *Branam* discuss the fact that § 544 relates to the trustee's, or in this
6 case debtor-in-possession's, power to avoid certain pre-petition transfers. The basis
7 behind that, however, is not because the statute itself says that it only applies pre-
8 petition, but because of the language of § 544, specifically § 544(a), provides that the
9 trustee "may avoid any transfer of property of the debtor." Section 544(b), stating it
10 in another way, provides that "the trustee may avoid any transfer of an interest of the
11 debtor in property." The courts have held that since upon the filing of a bankruptcy
12 petition the property or interest of the debtor becomes "property of the estate" under
13 11 U.S.C. § 541, § 544, by its terms, may only be used to avoid the transfer of
14 property that is property of the debtor. On the other hand, § 549 steps in to allow the
15 trustee to avoid post-petition transfers of "property of the estate." We now have
16 these two statutes, § 544 governing the avoidance of a transfer of property or of an
17 interest in property "of the debtor," and § 549 governing the avoidance of a transfer
18 of "property of the estate." You did not cite me to any cases nor did I find any cases
19 that deal with the unique facts presented me in this case, those facts being the status
20 of property between the time the bankruptcy case was dismissed, as it was here on
21 September 17, 2007, and the time it was reinstated by the district court's reversal of
22 the dismissal order on February 8, 2008. What was, prior to the September 17, 2007
23 dismissal, property of the estate, once again became property of the Debtor after
24 dismissal. Had the Webb Mountain property been property of the estate on
25 September 18, 2007, the automatic stay would have prohibited the Defendants from

1 registering the four Quit Claim Deeds. As I discussed, however, in the February 11,
2 2209 Memorandum, the automatic stay was no longer in effect after the Debtor's case
3 was dismissed. So we have an unusual situation where this acreage in Sevier County,
4 the Webb Mountain property, became, once again, property of the Debtor that falls
5 within the purview, as I see it, of § 544 regardless of the fact that the transfer
6 occurred post-petition. So I find that Count XIII stands. The Defendants can reserve
7 these issues as affirmative defenses in the pretrial order, Mr. Dickenson. I am going
8 to deny the Motion for Judgment on the Pleadings. I think both Counts XII and XIII
9 are well pled and I have dealt with the other issues in the other motions.

10 An Order consistent with my opinion will be entered this afternoon.

11 FILED: April 21, 2009

12 /s/ Richard Stair, Jr.

13 RICHARD STAIR, JR.

14 U.S. BANKRUPTCY JUDGE

15 Note:

16 This transcript contains edits by the court correcting sentence structure and
17 grammatical errors.
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